Supreme Court, U.S.
FILED

No. 941781 APR 26 1995

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ATTORNEY R, Petitioner

v.

THE MISSISSIPPI BAR, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF MISSISSIPPI

APPENDIX

R. Charles Robb,
Pro Se
Post Office Box 10793
#5 Twelve Oaks Circle
Jackson, Mississippi
39209-0793
(601) 922-1111

April 26, 1995

Appendix

State Court

Opinions, Findings of Fact,

and Conclusions of Law

IN THE SUPREME COURT OF MISSISSIPPI

NO. 93-BA-00442

(decided January 26, 1995)

THE MISSISSIPPI BAR

V.

ATTORNEY R

EN BANC.

MCRAE, JUSTICE FOR THE COURT:

INTRODUCTION

A formal complaint was filed by the Mississippi Bar charging Attorney R with violating Rule 7.1(a), 7.2(f) and 7.4(a) & (b) of the Mississippi Rules of Professional Conduct which deals primarily with lawyer advertising and the failure to print the required disclaimer. The com-

plaint also charged Attorney R with violating Miss. Code Ann. §73-3-35 (1972) which is an oath that an attorney makes pledging that he will practice in good fidelity.

A hearing was held in front of the Complaint Tribunal whereupon the Bar's motion for summary judgment was granted and Attorney R's motion to dismiss was denied. An Opinion and Judgment was rendered by the Tribunal which found Attorney R guilty of violating all three rules and the statute. Attorney R was commanded to pay for the costs of the proceeding and given a private reprimand. Thereafter, Attorney R timely perfected this appeal. He raised the following issues on appeal:

I.

The omission of the disclaimer was not false, deceptive or misleading per se. [p.1]

II.

The rules, if found to be an irrebuttable presumption that it is a per se violation not to include a disclaimer, violates the Fifth and Fourteenth Amendment Due Process Clauses of the United States Constitution.

III.

If the Court does not find merit with the first issue, then the rules violate the attorney's First Amendment right of free speech.

IV.

The rules have been unenforced in the past, and therefore, warrant no discipline in this instance.

V.

The discipline does not satisfy the purpose of the rules.

The Bar counterclaimed on appeal for more severe discipline for the violations of which the Complaint Tribunal found him

guilty. Finding that the Complaint Tribunal appropriately analyzed and applied our Rules of Professional Conduct, we affirm Attorney R's punishment of a private reprimand and costs of the proceeding and deny the Bar's counterclaim for more severe discipline.

STATEMENT OF FACTS

Attorney R is a resident of Jackson, Mississippi and was a member of the Mississippi Bar at the time of his alleged violations of the Mississippi Rules of Professional Conduct. Attorney R advertised his legal services in The Real Yellow Pages of South Central Bell's Greater Jackson Telephone Book for the 1989-90 and 1990-91 editions.

The advertisements listed Attorney R as practicing in the following particular fields of law: auto accidents, faulty

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products, medical negligence, worker's

compensation and bankruptcy. This listing did not include the requisite statement that Mississippi does not certify expertise in particular fields of law. The crux of this case is the omission by Attorney R of the following disclaimer in his advertisements: **"Listing of these previously mentioned area(s) of practice does not indicate any certification of expertise therein." Mississippi Rules of Professional Conduct Rule 7.2(f)(emphasis added).** Before the Complaint Tribunal, Attorney R denied that the failure to include the statement was, as a matter of law, misleading, false or deceptive communication, but he did not deny that his advertisements omitted the language required by the rule. The Complaint Tribunal found such blatant disregard for the rules to necessitate punishment and issued a private reprimand in its Opinion and Judgment dated April 5, 1993.

DISCUSSION OF LAW

The Rules of Professional Conduct which Attorney R was charged with violating are summarized as follows:

1. Rule 7.1(a) which provides that a lawyer shall not make a false, deceptive or misleading communication about the lawyer or the lawyer's services.

2. Rule 7.2(f) which provides that if a public communication, other than an approved law list or law directory, refers to areas of law in which a lawyer performs or wishes to perform professional services, except those areas specifically governed by Rule 7.4(b), it must include immediately after the listing the

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following statement: **"Listing of these previously mentioned area(s) of practice does not indicate any certification of expertise therein."** Any public communication through a written medium

shall contain such statement in type no smaller than the largest size print used to list the areas of practice. (emphasis added).

3. Rules 7.4(a)&(b) provides that a lawyer may communicate the fact that the lawyer does or does not participate in particular fields of law; however the lawyer must include the statement required by Rule 7.2(f). **A lawyer may not state or imply that he is a specialist** except where he is designated a "Patent Attorney" or a substantially similar designation by the United States Patent and Trademark Office or where he is engaged in admiralty practice.

Attorney R was also charged with violating a statute which compromises an oath for attorneys to make to each court. The pertinent portion of which follows:

[w]ill demean myself, as an attorney and counselor of this court, according to

the best of my learning and ability, and with all good fidelity as well to the court as to the client; that I will use no falsehood nor delay any person's cause for lucre or malice, and that I will support the constitution of the State of Mississippi so long as I continue a citizen thereof.

Miss. Code Ann. §73-3-35 (Revised 1989).

This Court has addressed attorney advertising in the Yellow Pages when attorneys' conduct of this State was governed by the Code of Professional Responsibility. **McLellan v. Mississippi State Bar**, 413 So.2d 705 (Miss.1982). **McLellan** held that "the Bar may regulate advertising and impose discipline where the record

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indicates that a particular form or method of advertising has proved to be deceptive in the past..." **Id.** at 708.

The standard of proof for the Complaint Tribunal is clear and convincing evidence. **Attorney Q. v. Mississippi State Bar**, 587 So.2d 228, 231 (Miss.1991). This burden of proof is on the Bar to show in disciplinary proceedings that the attorney violated the rule(s) in question. **Terrell v. State Bar**, 635 So.2d 1377, 1384 (Miss.1994); **Attorney W. L. v. Mississippi Bar**, 621 So.2d 235, 237 (Miss.1993). While bar disciplinary proceedings are quasi-criminal in nature, "the beyond-a-reasonable doubt standard does not apply; rather, we require an intermediate level of certainty regarding the facts at issue, to-wit; a clear and convincing evidence standard." **Id.** at 232 (citing **Mississippi State Bar v. Odom**, 566 So.2d 712, 714 (Miss.1990); **Mississippi State Bar v. Nichols**, 562 So.2d 1285, 1287 (Miss. 1990); **Levi v. Mississippi State Bar**, 436 So.2d 781, 783 (Miss.1983); and

Netterville v.Mississippi State Bar, 397 So.2d 878, 884 (Miss.1991).

Attorney R asserted that his omission was not proven to be false or misleading to the public. He said that it may or may not mislead the public, and a possibility does not rise to the higher standard of clear and convincing evidence. The Rules of Professional Conduct are interpreted "from the perspective of the reasonable client or, in this instance, the reasonable lay person with whom the lawyer is charge with misleading." **Attorney Q. v.Mississippi Bar**, 587 So.2d 228, 231 (Miss.1991). The United States Supreme Court has specifically mentioned that listings of

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areas of practice have the potential to mislead the public. **See In re R.M.J.**, 102 S.Ct. 929 (1982). Attorney R offered to the Complaint Tribunal a convoluted

argument about truthfulness claiming that there is nothing untruthful about the listings that he practices law in the areas mentioned in the ads. He further argued that there was no factual finding that he could not represent the public in these areas. This technically totally misses the boat. The Bar is not arguing that Attorney R is incapable of practicing law in these areas; the argument is that he cannot hold himself out as an expert which he impliedly does to the public when he lists his areas of practice. Attorney R countered this argument by claiming Rule 7.2(f) is in conflict with Rule 1.1 which he claimed requires expertise if he performs work in particular areas. Rule 1.1 does not require expertise, but rather, competency.

The Bar does not limit what an attorney can include in an advertisement unless information contained in the advertisement

is misleading, deceptive, or false. The idea is to ensure that lay people are not misled by the listing of areas of practice in the absence of certification of specialties in Mississippi. Attorney R claimed that the listings do not suggest any greater degree of professional qualification; the Bar believed to the contrary. Certainly, the implication of exceptional capabilities can arise. The public could easily assume that an attorney who lists areas(s) of practice in an advertisement is either a specialist or more competent in the particular area(s) listed than attorneys who do not

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advertise those particular area(s) or who advertise the area(s), but use the disclaimer. The disclaimer is to prevent misleading statements to the public and to prevent a disservice to all attorneys who comply with the rule.

Attorney R's second and third issues on appeal allege constitutional violations. The United States Supreme Court has addressed the issue of attorney advertising within the context of constitutional rights. **See, Peel v. Attorney Registration and Disciplinary Commission of Illinois**, 110 S.Ct. 2281 (1990); **Shapero v. Kentucky Bar**, 486 U.S. 464 (1988); and **In re R.M.J.** 455 U.S. 191 (1982). The Mississippi Rules of Professional Conduct are in line with the United States Supreme Court's mandate in **In re R.M.J.** which set forth that a state may prohibit misleading advertising entirely, but it may not place an absolute prohibition on potentially misleading information if the information could also be presented in a way that is not deceptive. **Id.** at 937 (specifically mentioning listing of areas of practice as being potentially misleading, not per se misleading).

Mississippi does not prohibit a lawyer like Attorney R from exercising his First Amendment rights of free speech, but the state has an interest in protecting the public, and hence, can regulate any potentially misleading communication as reasonably necessary. Attorney R's Fifth Amendment argument that regulations are not to be unreasonable, arbitrary or capricious in order to satisfy due process requirements is without merit.

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This Court has recognized that listing of areas of practice by attorneys has the potential to mislead the public, therefore the Bar's argument that it has a substantial interest on behalf of the state to regulate attorneys' conduct in this area is accepted. "[W]hen the particular content or method of the advertising suggests that it is inherently misleading or when the experience has

proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions." **In re R.M.J.**, 102 S.Ct. at 937. Consequently, Attorney R's argument that his constitutional rights have been violated are unfounded.

This Court conducts **de novo** review in a bar disciplinary matter which necessarily includes a review of the sanctions imposed. **Hoffman v. Mississippi State Bar**, 508 So.2d 1120, 1124 (Miss. 1987); **Myers v. Mississippi State Bar**, 480 So.2d 1080, 1089 (Miss.1985).

> [D]eference is accorded the findings of the Complaint Tribunal but this Court has the non-delegable duty of ultimately satisfying itself as to the facts, and reaching such conclusions and making such judgements as it considers appropriate and just.

Mississippi State Bar v. Varnado, 557

So.2d 558, 559 (Miss.1990).

On appeal, the Bar sought discipline greater than a private reprimand. "The most important consideration in imposing sanctions is that the punishment be sufficient to 'vindicate in the eyes of the public the overall reputation of the bar.'" **Mississippi Bar v. Hall**, 612 So.2d 1075 (Miss.1992) (citing **Mississippi State Bar Ass'n v. A Mississippi Attorney**, 489 So.2d 1081, 1084 (Miss.1986). Attorney R complained that the punishment he received

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should not be warranted because, according to him, the rules prior to this time were not enforced, and furthermore, the discipline did not satisfy the purpose of the rules. The Bar denied selective prosecution of advertising violations amongst attorneys claiming it sent out 20-38 different notices during the 1989-90 and 1990-91 time periods, and all of the at-

torneys except Attorney R chose to bring their ads in compliance with the rules. The Bar had no formal written complaint against Attorney R's or any other attorney's action, but rather, reviewed the yellow pages advertisements in several cities in response to "letters of inquiry" and comments from other lawyers.

In cases involving attorney misconduct, this Court has set forth several factors for determining the appropriate discipline for attorney misconduct. **Mississippi Bar v. Attorney ST**, 621 So.2d 229, 233 (Miss.1993); Hall, 631 So.2d 120, 125 (Miss.1993) and **Hall**, 612 So.2d at 1077 (citing **Mississippi State Bar v. Blackmon**, 600 So.2d at 166, 173 (Miss.1992); **Mississippi Bar v. Strauss**, 601 So.2d 840, 844 (Miss.1992); **Attorney Q v. Mississippi State Bar**, 587 So.2d 228, 234 (Miss.1991); and **Fougerousse V. Mississippi State Bar Ass'n**, 563 So.2d 1363,

1366 (Miss.1990). The factors are: (1) the nature of the misconduct involved; (2) the need to deter similar misconduct; (3) the preservation of the dignity and reputation of the profession; (4) the protection of the public; and (5) the sanctions imposed in similar cases. **Id.**

Nothing can be more clear and convincing than the actual

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photocopies of the advertisements as they appeared in the telephone book evidencing Attorney R's omission of the statement. Perhaps no other activities, aside from an attorney's actions themselves, communicate more about the profession than advertisements. It is imperative that the profession be regulated in this area to avoid an already diminishing view of the judicial system by the American public. Given the magnitude of this subject and Attorney R's obvious disregard for the

rules, sanctions were appropriately imposed in this case.

CONCLUSION

There is clear and convincing evidence of the existence of violations by Attorney R of Rules 7.1(a), 7.2(f), and 7.4(a) & (b). In addition, there is clear and convincing evidence based on the transcript that Attorney R knew he was violating the Rules by not including the disclaimer in his advertisements. While the statute's language sweeps over the conduct required for Attorney R, there is more than sufficient evidence based on the exhibits to issue a private reprimand to him for his omissions pursuant to the Rules.

As there were no material facts that were truly disputed, the Mississippi Bar was rightly entitled to a judgement as a matter of law. Finally, considering the nature of Attorney R's violations of the

Rules, the imposition of a private reprimand was quite generous of the Tribunal and more than appropriate. Accordingly, the Bar's

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request that Attorney R's discipline be more extensive is denied, and the holding of the Complaint Tribunal is affirmed. JUDGEMENT IS AFFIRMED.

HAWKINS, C.J., LEE AND PRATHER, P.JJ., SULLIVAN, PITTMAN, BANKS, ROBERTS AND SMITH, JJ. CONCUR.

Complaints Tribunal

Opinions, Findings of Fact,

and Conclusions of Law

IN THE SUPREME COURT OF MISSISSIPPI

(BEFORE A COMPLAINT TRIBUNAL)

THE MISSISSIPPI BAR COMPLAINANT

VS CAUSE NO. 90-B-784

R. CHARLES ROBB, III RESPONDENT

BEFORE A COMPLAINT TRIBUNAL
CONSISTING OF:

JUDGE SEBE DALE, JR.
HON. DAVID S. CRAWFORD
HON. EATON A. LANG, JR.

OPINION AND JUDGMENT

THIS MATTER CAME ON for hearing before this Tribunal on October 22, 1992 on the Motion for Summary Judgment filed by the Complainant, The Mississippi Bar ("the Bar") against Respondent, R. Charles Robb, III ("Mr. Robb") and Mr. Robb's Motion to

Dismiss. The Tribunal having denied Mr. Robb's Motion, granted the Bar's Motion, and held the matter under advisement for subsequent announcement of disciplinary action, now presents its Opinion and Judgment in this cause.

FINDINGS OF FACT

1. The Formal Complaint in this cause was filed on July 27, 1990 with an Amended Formal Complaint being filed on August 21, 1990. Mr. Robb's Answer was filed October 24, 1990. At all times hereinafter mentioned, Mr. Robb was a member of the Bar subject to the disciplinary jurisdiction of the Supreme Court of Mississippi and its designated agencies.

2. The Tribunal has jurisdiction over the parties and subject matter hereto.

3. During the years 1989 through 1991, Mr. Robb advertised his legal services through a means of public communication, to-wit: The Real Yellow Pages of the

1989-1990 and 1990-1991 editions of South Central Bell's Greater Jackson Telephone Book.

4. The above-referenced advertisements communicate that Mr. Robb practices in particular fields of law (auto-accidents, faulty products, medical negligence, worker's compensation, and bankruptcy), without using the following disclosure: "Listing of these previously mentioned areas of practice does not indicate any certification of expertise therein."

CONCLUSIONS OF LAW

Based on clear and convincing evidence, Mr. Robb has violated certain provisions of the Mississippi Rules of Professional Conduct for the Bar approved by the Mississippi Supreme Court being:

A. Rule 7.1(a) which provides that a lawyer shall not make a false, deceptive or misleading communication about the lawyer or the lawyer's services;

B. Rule 7.2(f) which provides that if a public communication, other than an approved law list or law directory, refers to areas of law in which a lawyer performs or wishes to perform professional services, except those areas specifically governed by Rule 7.4(b), the public communication must include immediately after the listing the following statement: "Listing of these previously mentioned areas of practice does not indicate any certification therein." According to the Rule, any public communication through a written medium shall contain such statement in type no smaller that the largest size print used to list the areas of practice.

C. Rule 7.4(a) and (b) which provide that a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. In public communication of practice in particular

fields of law, however, a lawyer must include the aforesaid statement required by Rule 7.2(f).

Furthermore, a lawyer shall not state or imply that the lawyer is a specialist except as follows: A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation; a lawyer engaged in admiralty practice may use the designation "admiralty", "proctor in admiralty", or a phrase substantially similar designation.

D. §73-3-35 of the Mississippi Code of 1972, as Amended, the oath of attorneys, which requires the attorney demean himself with all good fidelity to the Court as well as to the client, to use no falsehood to delay any person's cause, and to support the Constitution of the State Of Mississippi.

Based upon clear and convincing evidence, it is the opinion of the Tribunal that Mr. Robb has demonstrated unprofessional and unethical conduct and conduct evincing unfitness for the practice of law which constitutes cause for the imposition of discipline.

JUDGMENT

That based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed that:

1. Mr. Robb, be and is hereby issue a **PRIVATE REPRIMAND** for the conduct which is the subject of Cause No. 90-B-784.

2. When this Opinion and Judgment becomes final, the Clerk shall mail a copy of this Opinion and Judgment to the Honorable Michael B. Martz, P. O. Box 2168, Jackson, MS 39225-2168.

3. Mr. Robb shall pay unto the Bar the sum of $18.85 previously assessed by the Committee on Professional Responsibility

for the Bar, together with all actual, reasonable costs and expenses of this litigation, and that within ten (10) days of the date on which this Opinion and Judgment becomes final, the Bar shall file its Motion for Costs and Expenses and present same to this Tribunal.

4. That pursuant to Rule 8.6(ii) of the Rules of Discipline for the Bar, when this Opinion and Judgment becomes final, the Clerk shall forward an attested copy of same to the Judges of the Circuit and Chancery Courts in and for Warren County, Mississippi and for Hinds County, Mississippi with instructions to said Judges that the contents of this Opinion shall remain confidential.

5. That the Clerk of this Court shall immediately forward to the attorneys of record for the parties herein a copy of this Opinion and Judgment and that an attested copy of same shall be forwarded to

the Executive Director of The Mississippi Bar, at Post Office Box 2168, Jackson, MS 39225-2168.

6. That when this Opinion and Judgment become final, the contents of Cause No. 90-B-784, together with this Opinion and Judgment shall in other respects remain confidential and in full force and effect until further order of the Supreme Court Of Mississippi.

So Ordered, Adjudged and Decreed this the 5 day of April, 1993.

Judge Sebe Dale, Jr.
Presiding Judge

Hon. David S. Crawford

Hon. Eaton A. Lang, Jr.

Approved as to form
and Content:

The Mississippi Bar

By: John F. Davis
Attorney for Complainant
The Mississippi Bar

R. Charles Robb

By: R. Charles Robb
Respondent, Pro Se

Other Appended Materials

First Amendment, **The Constitution of the United States of America:**

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment, **The Constitution of the United States of America:**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, **The Constitution of the United States of America:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities

of citizens of the United States; nor shall shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mississippi Rules of Professional Responsibility:

Rule 7.1, Communications Concerning A Lawyer's Services.

A lawyer shall not make a false, deceptive or misleading communication about the lawyer or the lawyer's services. A communication is false, deceptive or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services or fees with other lawyers' services of fees.

Rule 7.2(f), Advertising.

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public communication. The term "public communication" includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, periodical, book, sign, display, directory, professional card, letterhead, listing or through written communication not involving solicita-

tion as defined in Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for six years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay reasonable costs of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

(e) If a public communication quotes a fixed fee to be charged for legal service, it shall contain immediately

after the quoted fee the following statement. "The Rules of Professional Conduct of the Mississippi State Bar require that the above services be performed by this lawyer (or firm) for not more than the advertised fee." Any public communication through an electronic medium shall contain such statement at a time and in a tone and manner so as clearly to convey the required information to the listener or viewer.

(f) If a public communication, other than an approved law list or law directory, refers to an area(s) of law in which a lawyer performs or wishes to perform professional services, except those areas specifically governed by Rule 7.4(b), the public communication must include immediately after the listing the following statement: "Listing of these previ-

ously mentioned area(s) of practice does not indicate any certification of expertise therein." Any public communication, through a written medium shall contain such statement in type no smaller than the largest size type used to list the areas of practice. Any public communication through an electronic medium shall contain such statement at a time and in a tone and manner so as clearly to convey the required information to the listener or viewer.

Rule 7.4, Communication Of Fields Of Practice.

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. In public communication of practice in particular fields of law, a lawyer must include the statement by Rule 7.2(f).

(b) A lawyer shall not state or imply that the lawyer is a specialist except as follows: (1) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation; (2) a lawyer engaged in admiralty practice may use the designation "admiralty" or a substantially similar designation.